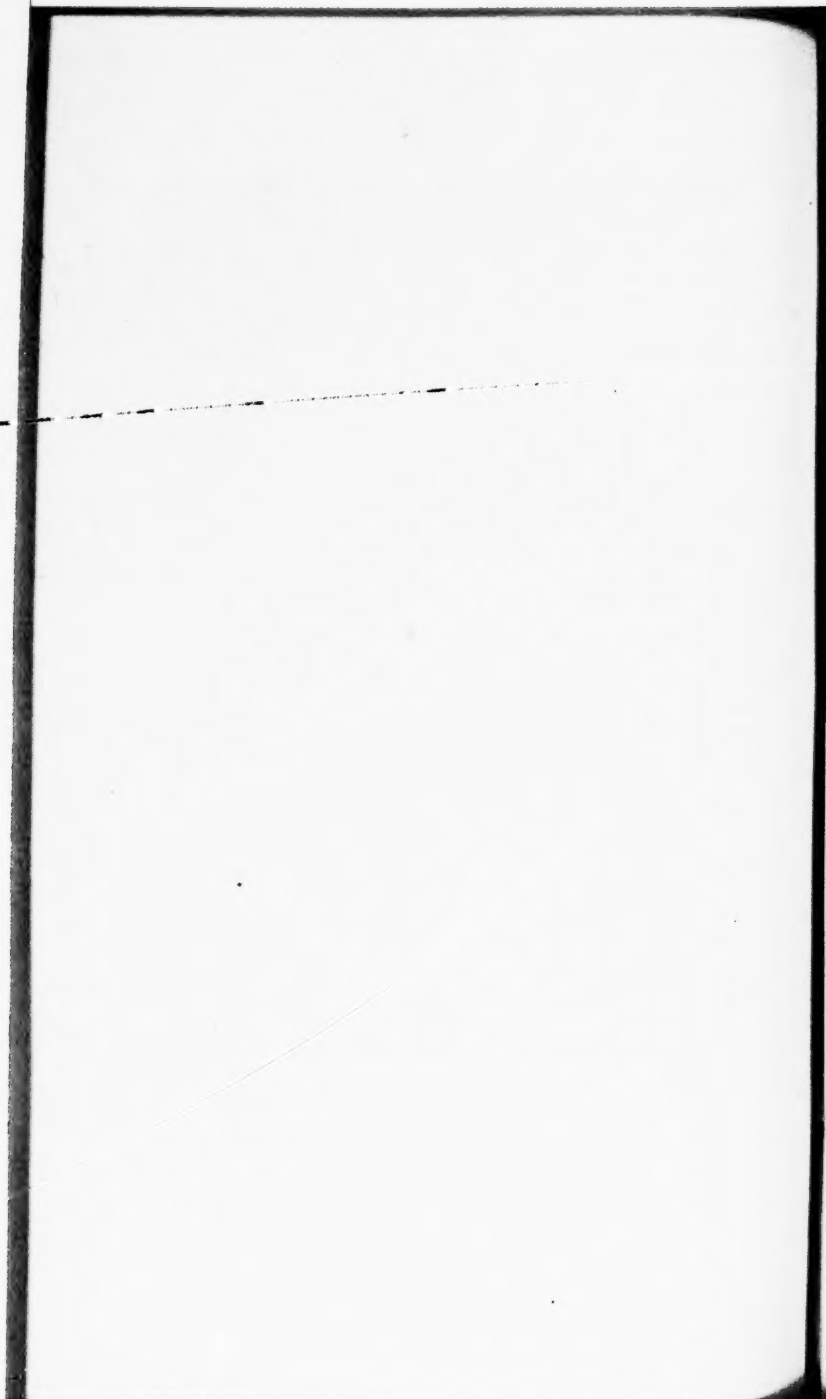

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SUPREME COURT U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 552

OBERLIN M. CARTER ET AL.,
Cross-Appellants,

vs.

UNITED STATES OF AMERICA,
Cross-Appellee.

PETITION FOR REHEARING.

OBERLIN M. CARTER,
Pro se.

Chicago, May 12, 1910.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1909.

Oberlin M. Carter, *et al.*,
Cross-Appellants,
—*vs*—
United States of America,
Cross-Appellee.
} No. 552.

The said Oberlin M. Carter comes now in person and respectfully petitions this Honorable Court for a rehearing of said cause, for the following reasons, to-wit:

1. This court erred in thinking that in receiving money from the contractors, Westcott was not their partner, but simply acted as my agent (Opin., 11), *because*

(a) There is no pretense of any evidence to that effect;

(b) The trial court took nearly two years to consider the 50,000 pages of the record, and after an examination of all the evidence, including Westcott's checks, check-stubs, deposit slips, brokers and other accounts, that court held that Westcott was a secret partner with the contractors on his own behalf, and not on my behalf (Rec., 387-388) and this finding was not disturbed by the Circuit Court of Appeals, which is an affirmance thereof; in fact the Circuit Court refused to hold that I even suspected Westcott's partnership with the contractors (Rec., 379, 381) and the Circuit Court of Appeals held there was no direct evidence that I ever suspected Westcott's partnership (Rec., 13425).

(c) The evidence is not only overwhelming that Westcott was a secret partner with the contractors unknown to me, but there is no pretense of any suggestion to the

contrary, save the manufactured exhibits of one Edward Israel Johnson, an accountant employed by the prosecution, who admittedly knew nothing of his own knowledge, and whom the trial court found guilty in this very connection, "in a number of instances," of swearing to "forced balances" (Rec., 380), *i. e.,* of committing perjury. Some of the most glaring instances of perjury committed by the witness Johnson, in his endeavor to make the court believe Westcott was my agent, are set forth in a brief of counsel. (pp. 107-127.) This witness was not only shielded from punishment, but is still carried on the Government payroll.

(d) The evidence is entirely uncontradicted that when I returned from Europe in 1897 and found myself suddenly confronted with charges against me and needed money for my defense, I went to Westcott and begged him to buy back from me certain property which I had bought from him and had paid him for, principally with what I had inherited from my wife. He bought back this property from me on October 11, 1897, and paid me exactly what I had paid him for it. (Rec., 5680, 11289, etc.) The fact that I was obliged to do this instead of asking Westcott to advance me money enough to meet my unexpected expenses, is conclusive proof that at that time the money Westcott subsequently gave to me in Elihu Root's law office was his and not mine.

(e) The trial court found that Westcott was "a retired contractor of *considerable* wealth," and the evidence is entirely uncontradicted that Westcott was interested in a number of ventures with Greene & Gaynor; for instance, he bid for them on a contract in New Jersey; he went to see C. P. Huntington for them regarding a contract in California; and it appears they took him into partnership with them on his representation that through

his intimate friend Cornelius Vanderbilt he could procure for them a contract for the New York subway.

(f) In addition to all this there is the following uncontradicted evidence: Westcott's attorney testified that Westcott admitted to him that the money in question was his [Westcott's] and that he contemplated investing it in his wife's name (Rec., 4684); to the same effect is the testimony of Westcott's brokers (Rec., 4681; 888-900; etc.); in fact Mr. Flagg testifies concerning these securities that Westcott acknowledged to him that they were his [Westcott's] (Rec., 2379).

2. This court erred in assuming as correct the assertion of the prosecution that I made investments aggregating "more than four hundred thousand dollars" (Opin., 11), *because,*

(a) Both lower courts refused to so hold;

(b) There is not a shred of evidence to that effect, and on the contrary the evidence is entirely uncontradicted that my total investments—outside of the $50,000 which the trial court found I had inherited from my wife (Rec., 386)—were only about $25,000.

3. This court erred in thinking that the securities which Westcott gave to me as my wife's share of her father's estate in October, 1897, were securities which I had bought "ostensibly for Mr. Westcott" (Opin., 12), *because,*

(a) Both lower courts refused to so hold;

(b) The uncontradicted evidence shows that out of the entire $285,000 (par value) of those bonds, Westcott *in person* bought $215,000 thereof from his own brokers, and paid for them in person, largely by checks in his own handwriting, drawn against his own bank account, and $55,000 more were bought for Westcott by me under

a written power of attorney from him, on his own order given by him to his own brokers, and paid for out of his own funds and delivered to him; *while I bought only* $15,000 *of those bonds!* (Ref., 320.)

4. This court erred in thinking that the income "from these investments" was collected by me "ostensibly for Mr. Westcott" (Opin., 12), *because,*

(a) Both lower courts refused to so hold;

(b) The uncontradicted testimony of witnesses of unquestioned veracity, shows that the bonds were Westcott's (Ref., 325-377); and that the income therefrom was largely collected by Westcott *in person,* was deposited by him in his own handwriting in his own bank account, and was used by him for his own private purposes. (Ref., 323-386.) In fact, Mr. Charles McPherson, whose testimony is entirely uncontradicted, says:

"Prior to the year 1897 Westcott gave checks to pay for these bonds, or collected coupons off these bonds, or otherwise handled all these bonds as his own,"

and McPherson further testified,

"that evidence with regard to each bond is in Westcott's own handwriting." (Rec., 7340.)

(c) The uncontradicted evidence further shows that when I collected any income from those bonds I invariably accounted to Westcott for it, and the uncontradicted testimony of McPherson is,

"the fact that Captain Carter accounted to Westcott for the coupons collected by him would be the strongest intimation that Captain Carter was *not* the owner of the bonds." (Rec., 7125.)

(d) The uncontradicted testimony of Mr. Charles McPherson is further, that:

"Westcott collected and used the coupons off all the bonds in court (except those belonging to Carter's wife's

estate) up to October, 1897—used the money for his own private purposes,"

and McPherson still further testified concerning the bonds from my wife's estate that Westcott

"frequently collected these coupons at the same time that he collected coupons off the other bonds, that he carefully accounted to Carter for the coupons off his wife's estate bonds and never accounted to him for the coupons off the other bonds." (Rec., 7701.)

This testimony is supported by that of Mr. Robert Nelson, is entirely uncontradicted, and proves conclusively that those bonds were Westcott's and not mine.

5. This court erred in thinking there are suspicions "which point to his [Carter] having had personal custody of these securities" "up to the time he [I] went abroad" on August 7, 1897, and that I then turned them "over to Westcott" for "safe keeping" (Opin., 13), *because,*

(a) Both lower courts refused to so hold;

(b) The evidence is entirely uncontradicted that Westcott had those securities in his own safe deposit box, to which he had cancelled my access on July 6, 1897 (Rec., 5808-20; 6393).

(c) Westcott gave to me some coupons off these bonds which I collected in July and August, 1897, and accounted for to Westcott (Ref., 410); but there were other coupons for those same months still attached to the bonds and which I could not cash because I had no access to those bonds (Ref., 409-14), thus proving conclusively not only that the bonds were Westcott's and not mine, but that I had not even any access to them.

6. This court erred in thinking that because I was willing to give back to Westcott the securities he gave to me in Elihu Root's law office in October, 1897, as my

wife's share of her father's estate, I was simply receiving back property which I "had reason for concealing from publicity" (Opin., 14), *because,*

(a) Both lower courts refused to so hold;

(b) The uncontradicted evidence is that I preferred to give back to Westcott my wife's share of his estate, which he then gave to me, rather than to have him leave me as he did, and there is no pretense of even a shred of evidence that I was receiving back from Westcott my own money;

(c) Those securities were given to me publicly by Westcott in Elihu Root's law office in the presence of Stimson, Westcott's attorney, and Rose, my attorney, on October 29, 1897, the very day I was on trial charged with having received money from the contractors, and unless those attorneys *knew* it was the honest transfer it purported to be, then both Stimson and Rose were criminals and were using Root's law office as a clearing house for stolen property, and there is no reason for this Honorable Court to assume that these men are criminals;

(d) I went openly to Elihu Root's law office on the very day I was on trial, when the newspapers were full of these matters, and received the securities from Westcott, and in the presence of witnesses gave public written receipts, describing the securities in detail, and it is unthinkable that I would have done this if I had had the slightest suspicion Westcott had received them from the contractors.

7. This court erred in thinking that because Westcott ran away to Europe in October, 1897, when I wanted him as a witness, it "justifies a presumption" of my guilt, (Opin., 14-15), *because*

(a) The evidence is uncontradicted that Westcott ad-

mitted I had repeatedly urged him to testify (Rec., 6572-73) which I would not have done if I had known of anything wrong;

(b) The evidence is uncontradicted that in 1895 Westcott and his wife went to Europe for more than a year, and left me with a written power of attorney, which gave me entire control of their fortune, which everyone knows they would not have done if they had not known me to be honest;

(c) The evidence is uncontradicted that Westcott ran away to Europe because he had been a secret partner with Greene & Gaynor, and had determined to throw suspicion upon me in order to save himself;

(d) The evidence is further uncontradicted that when the Government sought to justify my mistaken condemnation, Westcott was brought back from Europe to testify, when I was not permitted to confront him, and he admitted on the witness stand that he would commit perjury if he were shielded from punishment, saying

"I am perfectly wililng to say anything if you do not make me responsible for what I say." (Rec., 11717.)

And the record further shows that "his testimony was perjury" (Rec., 7432), and he was not made "responsible" for such perjury, but was shielded from punishment by the government.

Will this Honorable Court permit me to be destroyed because I was unable to compel the attendance before a Military Court, where I had no power to summon witnesses, of such a person as this man Westcott has shown himself to be?

8. This court erred in thinking that Gillette "very early discovered indications of maladministration by his predecessor [myself]" (Opin., 13), *because*

(a) Every charge made against me by Gillette was

found false by the concurring opinions of the lower courts (Rec., 13409-18; 13425);

(b) The record is clear that Gillette's testimony against me was perjury (Rec., 260, 510);

(c) The record shows that out of government funds Gillette paid those who were willing to commit perjury against me, and that he dismissed from the government service those who would not testify against me. (Wit., 50-55.)

See also the opinion of the trial court. (Rec., 378-79.)

9. This court erred in thinking that simply because the contractors may have made an "abnormal profit" the United States was in any way defrauded, *because*

(a) The uncontradicted testimony of 12 engineer officers, 5 civil engineers and inspectors and 12 disinterested competitive contractors, is that the contracts were let at the usual market price, and there is no evidence to the contrary (Con. Br., 7-10);

(b) The lower courts have concurred in holding that the contracts were honestly let and honestly carried out according to their terms, that the work was "a triumph of engineering skill" (Rec., 359, 13423);

(c) The lower courts concurred in holding, and the evidence is overwhelming and substantially uncontradicted, that by exercising the discretion vested in me under the contracts to increase the amount of brush and decrease the amount of stone used, I saved more than two millions of dollars to the government, and rendered possible the successful completion of the work, and this would not have been possible if I had followed the methods urged by the prosecution (Rec., 13411, etc.);

(d) This court admits there has never been any determination by the courts "as to the method by which the

government had been defrauded or as to the extent of actual losses sustained" (Opin., 4); and surely I am entitled to know in what way the court suspects the government could have been defrauded through me, and be given an opportunity to show to this Honorable Court that those suspicious are not justified by the facts.

Is it not axiomatic that there could have been no fraud upon the government under contracts which the courts held were honestly let at fair market prices, and honestly performed according to their terms, and which produced, as these did, at exceedingly low cost, one of the most successful harbor improvements of its class in the world?

10. This court erred in thinking that no explanation of why the contractors made large profits, appears in the record (Opin., 10), *because* the testimony of the prosecution's own witnesses, which is entirely uncontradicted, is that the market price of labor was $1.50 a day and that Greene & Gaynor, through peonage, paid only $1.00 a week, thus defrauding their laborers—and not the United States—of more than $1,250,000 on one contract alone. (Ref., 61.)

This uncontradicted evidence introduced by the government surely explains fully and completely why the profits of the contractors were large and why I had no control over them.

11. This court erred in awarding any deficiency judgment whatever against L. D. Carter, I. S. Carter or myself, *because* we entered into a written contract with the United States, dated November 6, 1901, which was approved by the trial court, by the Circuit Court of Appeals and by this court, wherein it was expressly agreed by the government that all three of the Carters should be

exempted from liability from all assets "heretofore *bona fide* disposed of by them, and therefore beyond their control" (Rec., 13419), and the contract itself construed the words "*bona fide*" to mean all moneys "paid out or pledged," "prior to the receivership," that is, November 6, 1901, "for attorney's fees or as expenses in defense of Carter," etc. (Rec., 13421.)

In the schedule of the $105,019.66 for which it was decreed I should be held responsible and toward the payment of which my own personal funds, amounting to some $37,000 were directed to be applied, every item save $2,581.72 is admitted by the complainant to have been paid out "*bona fide*" "for attorney's fees or as expenses in defense of Carter," *i. e.,* is admitted by the complainant to be expenditures for which under that contract I should not be held responsible.

Should not even the government be compelled to observe its solemn written contracts?

I earnestly beg that this Honorable Court will grant me a rehearing of this cause, not only for the reasons hereinbefore given, but because

(a) I was tried by a Military Court, where I had no power to produce evidence in my behalf, and was convicted, admittedly against the uncontradicted evidence and on suspicion alone, after so eminent a legal authority as ex-Senator Edmunds, who reviewed the evidence for the President, had declared there was no evidence justifying my conviction;

(b) I was tried only for alleged offenses in connection with the contracts of 1896, and was convicted of having embezzled money under those contracts;

(c) I plead for a trial in the civil courts, in order to prove my innocence, and now those courts have concurred

in holding that neither I nor Westcott, nor anyone else with whom I was in any way connected, ever received a dollar from those contracts, *i. e.,* that my conviction and degradation were for an offense of which I was wholly innocent, an alleged offense which in fact did not exist;

(d) In this new trial, wherein the government seeks to justify its mistaken condemnation of me, I have been charged with practically everything my enemies could invent, for a period covering my entire life;

(e) No charge has ever been made against me in any tangible shape, that I have not proved it false, and had that proof sustained by the courts.

I therefore beseech this Honorable Court not to condemn me now on a general "chain of circumstances," *i. e.,* on "suspicions," without first giving me an opportunity to show that those suspicions have no foundation in fact, as I can do from the proof in this record, *which this court could not possibly have had time to read through,* if only I am apprised in advance of what those suspicions are and allowed to meet them.

If the money in court was received by Westcott from the contractors, then I do not want it, nor would I make this plea to this Honorable Court for my mere life; but I have served my country faithfully and in entire integrity, and as the courts have held with some measure of success;

I was in prison some six months before I was ever permitted to know of the alleged evidence on which I was condemned in secret, which evidence was manufactured and used against me without my knowledge by the witness Johnson, whose testimony has since been proven to be perjury;

I have suffered years of utterable agony, with the hope

that when I reached this court I should be permitted to know what is charged against me and be given an opportunity to meet it;

I have successfully controverted every charge against me which was made in daylight, or with sufficient definiteness to enable me to know what it was, and the courts have so held;

I therefore earnestly beg that this Honorable Court will not now condem me without any facts, but on suspicions which I know to be unfounded, and can show to be unfounded if I am given an opportunity.

It is true that I am but one individual of this entire nation, but this is a question of vital importance to every American, for if an individual can be condemned as I have been, admittedly without any facts being proven against him, but on mere suspicion, then no man in this country is safe when attacked by the agencies of the government through the use of perjured testimony, the perpetrators of which are shielded from punishment; and for that reason I most earnestly beg that this Honorable Court will give me an opportunity, which I have not had, to show, as I can, that the suspicions or chain of suspicious circumstances upon which I have been condemned, prove in fact my innocence and not my guilt.

If this petition has not been couched in the proper legal phraseology in every respect, I pray this court to pardon its shortcomings; but I felt that I must prepare this appeal myself, as it may be the last time on this earth where I shall ever have an opportunity to ask for the simple justice to which my birthright entitles me. Hence I most earnestly pray that this petition may be granted.

Respectfully submitted,

OBERLIN M. CARTER,

Pro se.

CHICAGO, May 12, 1910.